

ARKANSAS SUPREME COURT

No. CR 06-115

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered

September 28, 2006

TIMOTHY J. NESDAHL
Appellant

PRO SE APPEAL FROM THE CIRCUIT
COURT OF FAULKNER COUNTY, CR
2004-2354, CR 2004-2842, HON.
CHARLES E. CLAWSON, JR., JUDGE

v.

STATE OF ARKANSAS
Appellee

AFFIRMED

PER CURIAM

Timothy J. Nesdahl entered a plea of guilty to one count each of manufacture of a controlled substance (methamphetamine), possession of a controlled substance with intent to deliver (methamphetamine), possession of paraphernalia to manufacture (methamphetamine), possession of drug paraphernalia, maintaining a drug premises and possession of ephedrine with intent to manufacture (methamphetamine). He received an aggregate sentence of 120 months' imprisonment.

Subsequently, appellant timely filed in the trial court a *pro se* petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. The trial court denied the Rule 37.1 petition after a hearing, and appellant, proceeding *pro se*, has lodged an appeal here from that order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

We first note that appellant failed to abstract the transcripts of the guilty plea hearings.¹ Further, the pertinent hearings were not included in the record on appeal. In such instances, we must turn to other means to distill basic information regarding appellant's guilty plea, such as the plea statement. *See e.g., Cox v. State*, 299 Ark. 312, 772 S.W.2d 336 (1989).

In this instance, appellant's plea statement is included in the record on appeal, but is not abstracted or contained in appellant's addendum. This court has repeatedly held that parties have an affirmative obligation to abstract those portions of the record relevant to the points on appeal, and the record is confined to that which has been abstracted. *Lee v. State*, 297 Ark. 421, 762 S.W.2d 790 (1989). Further, it is appellant's duty to bring up a record sufficient to demonstrate error.

Other information pertaining to appellant's guilty plea was discussed during the hearing on appellant's Rule 37.1 petition. Appellant failed to properly abstract testimony from the hearing on appellant's Rule 37.1 petition as required by Ark. Sup. Ct. R. 4-2(a)(5), and the portion of the hearing abstracted failed to include all pertinent information related to appellant's guilty plea.

We will not, however, require appellant to file a substituted addendum or abstract to cure these deficiencies in conformance with Ark. Sup. Ct. R. 4-2(b), or supplement the record, as it is clear on the record before us that appellant could not prevail. *See Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*).

In his first argument to this court, appellant finds fault with the findings of fact and conclusions of law issued by the trial court. The trial court's order contained the following findings of fact and conclusions of law:

1. That the Defendant in this case was represented by James Clouette.

¹From the record, it appears that appellant entered his plea of guilty on May 31, 2005, and returned to court on June 3, 2005, for sentencing.

2. That the Defendant appearing [sic] in open Court on May 31, 2005[,] and entered a plea of guilty to the charges pending against him in all cases and at that time executed a guilty plea statement which is filed and made part of the record.
3. That he acknowledged the guilty plea statement, he had read it and have [sic] covered its contents with his attorney. Contained therein under paragraph 5(g) Mr. Nesdahl waived and gave up his right to question facts, circumstances, evidence and to confront or raise all legal issues and theories. Mr. Nesdahl acknowledged that he understood that and it had been explained to him and that he was freely and voluntarily waiving or giving up his rights.
4. The Court finds as a result that the Defendant herein made a full knowing and intelligent waiver of his rights prior to entering his plea of guilty and that in so doing chose not to raise the challenges which he now contends affects the admissibility of certain evidence.
5. That the waiver was knowing and intelligent and as a result no basis exists to find that the Defendant had insufficient assistance of counsel.

Appellant first complains that the trial court's order failed to individually address appellant's contention that trial counsel rendered ineffective assistance of counsel. During his Rule 37.1 hearing, appellant contended that his attorneys failed to file a motion to suppress evidence obtained during the two searches of appellant's home conducted by the police.

Criminal Rule 37.3(c) requires that "[t]he court shall determine the issues and make written findings of fact and conclusions of law with respect thereto." Here, we find that the order set forth sufficient facts and legal support for the trial court's determination that appellant's ineffective assistance of counsel claim had no basis, and appellant has not established that the trial court's reasoning was unsound. Appellant's knowing and intelligent entry of his guilty plea, as shown by his guilty plea statement, precluded the need for a motion to suppress to be filed. The trial court's findings comport with Rule 37.3(c) and are not clearly erroneous.

Second, appellant argues that the trial court erred in finding that attorney James Clouette represented appellant. Appellant initially hired attorney John Collins to represent him, and later replaced Mr. Collins with Mr. Clouette. Both attorneys worked with appellant on finalizing and

implementing the State's plea offer. While represented by Mr. Clouette, appellant entered his plea of guilty at a hearing on May 31, 2005, but delayed his sentencing at his request so that he could spend time with his children before going to prison. He later returned to court and the trial judge approved the recommended sentences. At the sentencing hearing, Mr. Clouette, who was unable to attend the hearing, requested a public defender substitute for Mr. Clouette at the hearing. All the paperwork for the plea agreement had been finalized at the prior hearing and contained Mr. Clouette's signature as appellant's attorney of record.

Mr. Clouette's lack of attendance at the sentencing hearing is not dispositive of a lack of representation of appellant. Nothing in the record indicated that a public defender was appointed by the trial court to replace Mr. Clouette and represent appellant, and the trial court's statements during the Rule 37.1 hearing do not reflect appellant's assertion to be true. Appellant privately retained two attorneys to represent him and did not file a petition to proceed *in forma pauperis*, the first step to having a public defender appointed by the court, until he filed his notice of appeal. The public defender who appeared at the hearing apparently acted on behalf of appellant as a personal accommodation to Mr. Clouette, and stood in the shoes of Mr. Clouette. The trial court's finding that Mr. Clouette represented appellant is not clearly erroneous and likewise comports with the requirements of Rule 37.3(c).

Appellant's second point on appeal is that the trial court erred in denying appellant's petition for Rule 37.1 relief pertaining to appellant's allegations of ineffective assistance of counsel. As the result of ineffective assistance of counsel, specifically Mr. Clouette and the public defender, appellant claimed that the sentence he received did not correspond to the sentence he accepted.²

²Although appellant's original petition and brief to this court references a sentence subject to "the 70% law," appellant testified at the Rule 37.1 hearing that he agreed to an aggregate

Appellant attributed this failing of counsel to Mr. Clouette's failure to appear at the sentencing hearing. To prevail on a claim of ineffective assistance of counsel, appellant must show that counsels' representation fell below an objective standard of reasonableness and that but for counsels' errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*).

In the present matter, appellant received the precise sentence that he claimed he did not receive. At the Rule 37.1 hearing, the trial court pointed out to appellant that the judgment and commitment order indicated that appellant received an aggregate sentence of ten years' imprisonment only, with all sentences to run concurrently, and no additional sentence or suspended imposition of sentence. When questioned by the prosecutor, appellant admitted at the hearing that he expected to receive a ten-year sentence, and that this offer was related to him by both attorneys. Mr. Collins explained that the confusion may have arisen from the Amended Tentative Plea Recommendation form that contained an alternative sentencing option if appellant sought electronic monitoring while waiting for available room in an Arkansas Department of Correction facility.

Appellant fell short in his petition of demonstrating that he suffered any prejudice arising from Mr. Clouette's failing to appear at the sentencing hearing or from the public defender's having appeared with him at that hearing. Moreover, while the Prosecutor's Report, relied upon by appellant, does reference ten years' suspended imposition of sentence, the judgment and commitment order does not. As the judgment and commitment order contained the official sentence accepted by the court and imposed on appellant, we find no basis for appellant's claim that he received a different

sentence of ten years' incarceration for all charges, but additionally received ten years' suspended imposition of sentence as a result of ineffective assistance of counsel, for a total of twenty years. Appellant acknowledged that the form he relied upon to reach this conclusion contained portions that had been "whited-out."

sentence than the sentence he expected to receive. Appellant has thus failed to meet his burden of satisfying either prong of *Strickland* by relying upon an erroneous assertion not supported by the record.

Affirmed.